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Author

Haberfeld, Steven

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COMMENTARY

Government-to-Government Negotiations: How the Timbisha Shoshone Got Its Land Back

STEVEN HABERFELD

In September 1998 the US Department of Interior reached a comprehensive negotiated agreement with the Timbisha Shoshone tribe in Death Valley, California. It thereby resolved a grievance it had ignored since 1933 when President Herbert Hoover seized the tribe's ancestral lands and created the Death Valley National Monument.

At the time of this land seizure, the federal government made no provision for the tribe whose lands these had been for hundreds and perhaps thousands of years. Government officials hoped the tribal members would pack up their meager belongings and disappear quietly. To their surprise and frustration, fifty of some 275 people refused to go. For the next sixty-five years, under almost continuous agency pressure to leave, these remaining tribal members lived as virtual squatters on the outskirts of the national park headquarters in Furnace Creek. They clung stubbornly to the hope that they would live to see the day when the federal government would acknowledge the injustice done and restore their tribal homeland.

Steven Haberfeld is the founder and current associate director of Indian Dispute Resolution Services (IDRS), a national Indian nonprofit organization that trains tribal leaders and government officials in cross-cultural communication and conflict resolution. Haberfeld has worked with the Timbisha Shoshone since 1994, and was the principal designer of the negotiation process the federal and tribal teams eventually adopted to produce a win-win agreement. On 1 November 2000 President Bill Clinton signed the Timbisha Shoshone Homeland Act (PL 106-423). The legislation embodies the agreements reached by the tribe and the Department of the Interior.

The tribe made repeated attempts over the years to get the federal government's attention. These were all unsuccessful until October 1994 when Congress passed the California Desert Protection Act. This act added roughly 1.3 million acres to a newly established Death Valley National Park. This legislation did not provide the tribe with any land; however, the tribe was able to obtain a special provision, Section 705(b), inserted into the bill. It required the Department of Interior to study the tribe's ancestral lands within and outside Death Valley National Park, with the purpose of identifying lands "suitable for a reservation." The department was given one year to conduct the study and prepare and submit a report to Congress, and it was instructed to do so in consultation with the tribe.

The Department of Interior was not pleased with Congress' directive. It delayed action for a full seven months after the bill passed, arguing that Congress had not appropriated funds for the study process. Three agencies, the National Park Service (NPS), the Bureau of Land Management (BLM), and the Bureau of Indian Affairs (BIA) from the Department of Interior, and the National Forest Service (USFS) from the Department of Agriculture began to meet with the tribe in May 1995 in Death Valley.

Unfortunately, these talks between the federal representatives and the tribe ended in March 1996, producing little more than disappointment and anger. By that March the NPS had taken full control over the study process and made no pretense at collaboration. After nine months of "study," at least five major meetings between the tribe and a host of government officials, and three drafts of the study report, the NPS told the tribe that no lands within its 3.5-million-acre park were suitable for a reservation.

The tribe reacted strongly. It called the NPS decision an act of bad faith and a repudiation of congressional instructions to consider lands both within and outside the park. Instead of having what it regarded as more futile talks, the tribe chose a different strategy. It launched a national political organizing strategy designed to expose publicly the NPS's alleged "anti-Indian" policy, and to put pressure on them to come to the negotiating table in good faith.

There was no further face-to-face contact between the tribe and the federal government for the next two years. However, by the end of 1997 the tribe's political strategy proved effective in changing the balance of power and moving its cause closer to the top of the interior secretary's priority list. In January 1998, in a new political context and with some new federal representatives at the table, a second more balanced and successful round of negotiations began.

After more than nine months of intense negotiations, the federal agencies and the tribe produced a precedent-setting agreement. It provided the tribe with a permanent land base located in five different areas both inside and outside the national park. Almost ten thousand acres of desert land were to be set aside in trust status for tribal residences, community and government services, and economic development. Three hundred of these acres are in the heart of the national park. Almost another million acres were designated as a special Timbisha Shoshone Natural and Cultural Preservation Area. A wide range of opportunities for the tribe and the NPS and BLM were identified for cooperative management of natural and cultural resources within this new preservation area.

Parcels Included in the New Timbisha Shoshone Reservation

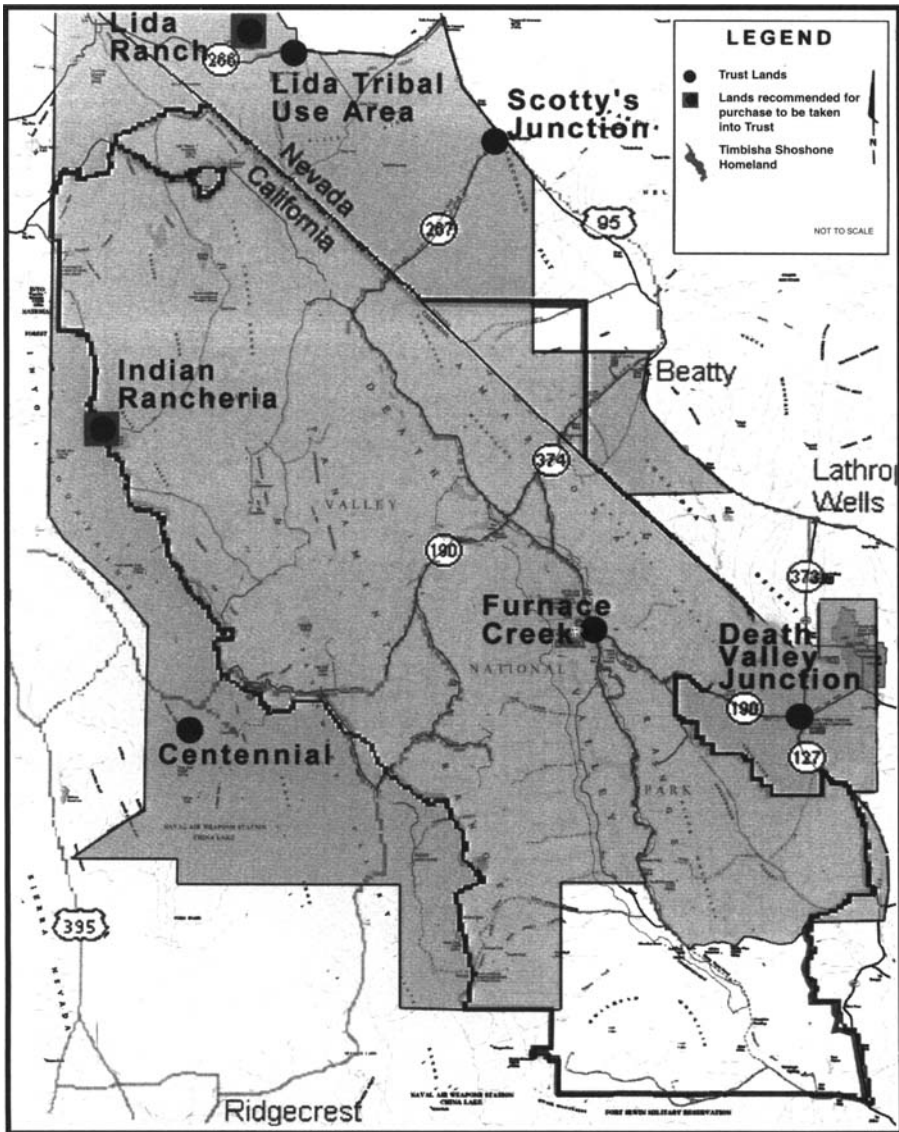


FIGURE 1. Source: Bureau of Land Management, 2000.

How was a successful negotiation process finally initiated, structured, and managed after so many years of enmity? What was done differently during the second round of talks that had not occurred during the first that accounts for the dramatic shift in the outcomes? How was a small tribe of roughly 300 members able to persuade an enormously powerful federal government to sit down with it as an equal, negotiate in good faith, and reach a win/win agreement?

How was the huge cultural gap bridged between a very traditional Indian tribe, wedded to its unique perspective and attached to its ancestral land, and federal land management agencies, which have very different perspectives on land, land use, and land ownership? Finally, how was the National Park Service persuaded to allow for the almost unprecedented establishment of an Indian reservation in the middle of one of its parks?

The purpose of this article is to address all these questions in describing the process by which the Timbisha Shoshone tribe and the federal government reached a negotiated agreement.

Apart from the story being an interesting account of one tribe's experience, it provides a number of important lessons about the negotiation process itself. This case study provides a unique opportunity to look in-depth at a multiparty dispute involving a sovereign Indian tribe and multilevel bureaucratic government agencies, to observe what negotiation strategies may and may not work in this context, and why.

This case study also addresses the ever-popular concept of win/win negotiations in a context in which there were huge power disparities between the parties. We have the unusual opportunity to compare the first round of talks, which were dominated by the federal government and ended in a complete breakdown, with a second round, in which the formerly weaker party (the tribe) repositioned itself to enjoy more leverage. We can see that after the tribe leveled the playing field and changed the political relationship it could accomplish much more in the negotiations.

Finally, this transaction between the tribe and the federal government has significant public policy implications. In April 1994 President Bill Clinton issued Executive Order 12875 in which he made a public commitment to institute a government-to-government relationship between all federal agencies and sovereign Indian nations. However, most of these agencies have not been altogether clear about how to put this order into practice. Should they initiate a consultation process that still works from the top down and allows them to retain unilateral control, or should they initiate a negotiation process in which the relationship is more equal and problems are resolved by mutual agreement? The successful experience in Death Valley demonstrates how two sovereign governments can come together as equals in bilateral negotiations and reach agreement without either party abdicating its sovereignty or sacrificing its vital interests.

BACKGROUND

During the discussions between the tribe and the federal government, precipitated by the California Desert Protection Act, there never was any question that Death Valley was the tribe's ancestral homeland. Tribal lands in Death Valley were taken away through external conquest by a more powerful entity. The federal government itself acknowledged the tribe's legitimate claim to the area when it granted the tribe formal federal recognition in 1983. It relied on solid data that the Timbisha Shoshone people lived as a distinct and self-governing tribe in the Death Valley area for hundreds of years.

Before Euro-American contact, the Timbisha Shoshone were hunters and gatherers engaged in limited farming activities. They were semi-nomadic, living in extended family clusters within an 11-million-acre area. Every year they moved their camps from the lower elevations (over two hundred feet below sea level) to higher, cooler, more mountainous areas during the extremely hot dry summer months when the temperature is commonly over 125 degrees Fahrenheit.

In the late 1800s the tribe's traditional way of life was interrupted by westward expansion and prospectors moving into their area looking for gold and silver. A large deposit of borax was discovered in Furnace Creek and the mine's owners quickly consumed available timber and scarce water to fuel their fires and process the natural resources. From the perspective of these aggressive outsiders eager to make their fortunes, the Indians were clearly in the way. Their settlements were repeatedly pushed further and further to the periphery of Furnace Creek.

The harassment by private interests was followed by the federal government's decision to establish the Death Valley Monument in 1933. From this point on, the National Park Service explicitly prohibited tribal members from moving freely to their cultural and spiritual sites and to those areas that provided their sources of sustenance, including mesquite beans, piñon nuts, wild life, and spring water. They were no longer permitted to make their seasonal rounds from the lower elevations to the high country.

For the next sixty-five years, the National Park Service engaged in repeated efforts to run off the remaining tribal members who refused to leave. After moving them three different times, the remaining tribal members were restricted to a small, barren, wind-swept forty-acre parcel of land on the outskirts of Furnace Creek and were prohibited from building any permanent structures. According to Tribal Chairperson Pauline Esteves, "Over the years, there were countless incidents in which we were intimidated and arbitrarily arrested by National Park Rangers. They shut off our utilities and water supply and destroyed some of our adobe houses by hosing them down when members left for work or to serve in the armed services. They did other things as well."¹

The tribe felt it had no one to whom it could appeal during this period. No one in Washington, D.C., either in the executive branch or Congress, was willing to talk to the tribe about restoring its land base despite repeated efforts by tribal leaders to raise the issue.

THE CALIFORNIA DESERT PROTECTION ACT

The turning point for the tribe did not come until October 1994 when Congress passed the California Desert Protection Act. Its passage changed both the physical and the political landscape of the Death Valley area.

While the act affected over seven-and-a-half million acres of desert land in southern California, it added roughly 1.3 million acres of multiple-use land previously managed by the BLM, to what had been the Death Valley National Monument. The legislation raised the status of the monument to a national park and put all the lands under more restricted use—primarily by designating them wilderness areas.

The Desert Protection Act was passed as a result of a hard-fought political struggle led by California Senator Diane Feinstein who sponsored the bill and a broad coalition of environmental groups and organizations that supported it. Other user groups such as hunters, cattlemen, prospectors and miners, off-road vehicle owners, local counties, Friends of the West, and others opposed to vast areas of western land being controlled and restricted by the federal government, were not quite so pleased. Congressman Jerry Lewis, who reflected the bitterness of these constituencies, was part of a group of congressmen who made sure that only \$1 was appropriated for its implementation.

The Timbisha Shoshone tribe, which had always seen itself among the original environmentalists, was not opposed to the higher level of resource protection that the act would provide. The tribe was unhappy, however, that its interests were being ignored by people drafting the legislation. All the BLM land being transferred to the NPS in Death Valley was part of the tribe's ancestral homeland, but no one viewed the legislation as an opportunity to address the tribe's longstanding grievance. Despite the tribe's strong moral position, it was being treated as insignificant in this political arena and excluded as a serious player.

When the tribe became aware of the pending legislation, it launched a last ditch effort to affect it. It was too late to break the momentum of the environmentalists and successfully negotiate a land transfer of its own while the legislation was in the final stages of formulation. However, with the help of legal counsel from California Indian Legal Services (CILS), the tribe enlisted the support of Senator Inouye and a few other key legislators and legislative staff from the Senate Committee on Indian Affairs and other congressional committees. The tribe was successful in including section 705(b), which provides: "the Secretary, in consultation with the Timbisha Shoshone Tribe and relevant federal agencies, shall conduct a study, subject to the availability of appropriations, to identify lands suitable for a reservation for the Timbisha Shoshone Tribe that are located within the tribe's aboriginal homeland area within and outside the boundaries of Death Valley National Monument and the Death Valley National Park, as described in part 'A' of this subchapter."²

The secretary's office of the Department of Interior and the leadership in the National Park Service vigorously opposed creating a reservation in Death Valley and tried to defeat the tribe's efforts to include section 705(b). Once the bill passed, the interior agencies still put up some resistance. They argued that the failure of Congress to appropriate money for the study left them without sufficient resources to undertake it. California's senior Senator Diane Feinstein, who authored the bill, also opposed the addition of the tribally inspired provision.

In retrospect, the tribe's ability to insert itself in the political process at this late stage and get section 705(b) included may have been the single most significant breakthrough in the tribe's sixty-five-year-long struggle for a land base. While no land was restored to the tribe by the act itself, its final version provided the tribe indication that its issue was finally on Congress' radar screen. It also gave the tribe a national forum in which to make its case and

try to leverage some political influence. The struggle was by no means over, but it appeared to the tribe that section 705(b) could be the platform on which the tribe could successfully pursue its land restoration goals.

ROUND ONE

The tribe and the federal government began their formal talks in May 1995. From the beginning of this process, the tribe saw itself as a full negotiating partner.³ In an effort to show up at the table in the strongest possible position, it applied for funds from the Administration of Native Americans (ANA) to help it form and train a negotiation team, and hire historians, anthropologists, archeologists, and economic planners to produce needed data. These consultants assisted the tribe's negotiation team to produce and present data documenting the boundaries of the tribe's ancestral homeland and supporting the tribe's proposals for land transfers, housing and economic development, and natural resource management opportunities presented to the federal agency representatives.

The First Meeting with Federal Representatives

About thirty people attended the first meeting in May 1995. A negotiation team of five persons represented the tribe. Some of its tribal members, its CILS attorney, and its negotiation consultant and advisor from Indian Dispute Resolution Services, Incorporated attended as well. The federal government team consisted of staff people from local, state, and regional offices of four federal agencies (NPS, BLM, USFS, and BIA). Only two people were from Washington, D.C.⁴

At the first meeting, the tribe's negotiating team was surprised that the federal agency representatives seemed unprepared.⁵ According to the tribal team, there seemed to be little thought beforehand about a framework or process for undertaking the study. There was no one agency designated to lead, no internal coordination among the agencies, and no person designated to serve as the point of contact for the tribe. Even though the National Park Service seemed to be the logical lead agency, the Death Valley Park superintendent indicated that the service did not want to play the central coordinating role.⁶

The first meeting focused on designing a study process. The suggestions presented at the meeting came primarily from the tribe and its consultants. The tribe had prepared a long briefing paper that outlined its perspectives on the problems and a proposed approach. The tribal and federal representatives agreed on a meeting schedule for the next five months and on people to serve as chairpersons and members of four working groups. They agreed to produce the study report together, and refrain from releasing information to the media or outside groups unless both parties first agreed.

Timbisha Shoshone Tribal Cooperative Activity Area

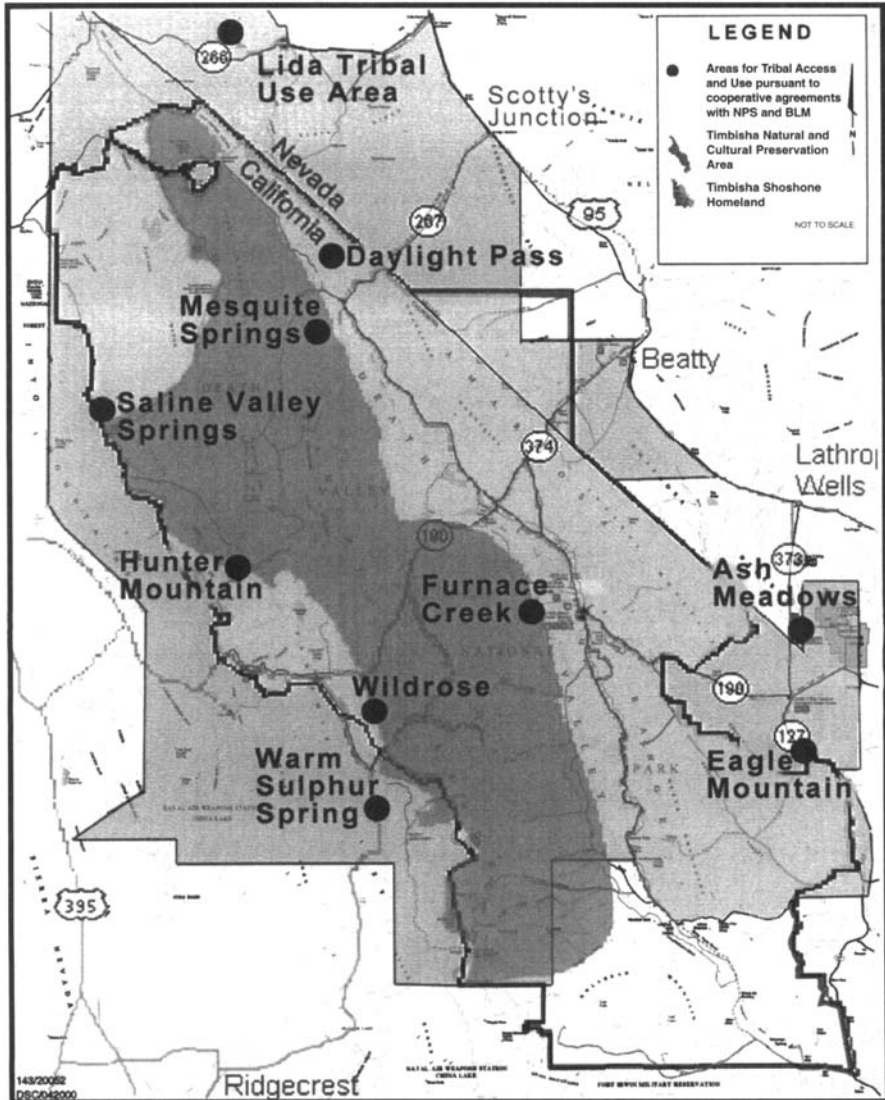


FIGURE 2. Source: Bureau of Land Management, 2000.

Subsequent Meetings between the Parties

The succeeding meetings consisted of the tribe making its case for acquiring trust land and for participating in the management and preservation of natural and cultural resources in Death Valley. The tribe presented its historical and anthropological data to describe the boundaries of its ancestral homelands as well as its traditional land uses and cultural practices. There was no serious disagreement about these data.

The Tribe Proposes Significant Transfer of Lands Inside and Outside the National Park

After these initial discussions, the tribe was asked to make its proposals, specifying location, size, and intended use of parcels both inside and outside the park boundaries. At the top of the tribe's priorities were 5,000 acres in the Furnace Creek area it wanted taken into federal trust status for residential and community economic development. Furnace Creek is an oasis that the tribe always regarded as its central location, for most tribal members lived there prior to Euro-American contact. The Death Valley National Park Service headquarters, a major visitor center, NPS offices, and personnel housing are located there. The Furnace Creek Inn and a large motel complex, both owned by the AM-FAC Corporation, provide over 1.5 million park visitors each year with overnight hotel accommodations, dining options, a mini-mart, and a gas station. The land on which these facilities are located, along with permanent water rights, have been in private ownership even before the establishment of the Death Valley National Monument in 1933.

The tribe requested another 750,000 acres in the western part of the park. These were under the jurisdiction of the BLM before being transferred to the NPS by the California Desert Protection Act. This region is of special historical and spiritual significance to the tribe, encompassing seven sacred areas as well as major watershed lands and resources, including wildlife, medicinal plants, springs, pinions, mesquite, and other food staples, that the tribal members historically used and cultivated. These lands form one large, integrated ecosystem.

The tribe's third area of interest was three smaller parcels located at the periphery of the ancestral homelands and outside the park on land the BLM had designated for disposal. These lay along main entrance routes to the park. Together they amounted to approximately another 11,000 acres. The tribe wanted these parcels for their future economic and residential development potential. Each of these three parcels is in areas in which groups of tribal members had lived in small family clusters on a subsistence basis before contact with Euro-Americans.

The Federal Representatives' Response

The tribe received little direct feedback from the federal representatives during the meetings in 1995. However, the tenor of the questions they raised revealed the general sentiment that the tribe was asking for too much land within the national park. A few federal representatives shared their belief that certain members of Congress would be reluctant to transfer ownership of any substantial parcel of land in the park, especially after the very heated political battle that led to the passage of the California Desert Protection Act. According to their logic, Senator Feinstein and environmental groups would fear that their winning coalition would unravel if there were any tinkering with the land that had just been brought into a new national park.

This sentiment was buttressed with an accompanying observation that most of the ancestral lands were now under wilderness designation. It was suggested that Congress would not want to give these protected areas to the tribe and that, even if it did, the tribe would be unable do anything with that land under these restrictive conditions.

A few members of the federal team also questioned how the tribe would be able to manage 750,000 acres given its lack of previous experience or training. To this, the tribe accurately pointed out that these lands had been managed with only the most minimal BLM staffing in the past, and that tribal members were trainable.

The federal representatives also expressed concern about the availability of sufficient water whenever tribal representatives described their need for home sites and the development of business enterprises to provide employment and income opportunities.

The federal representatives never provided any counter proposals or information about how the tribe might restructure its proposals to accommodate the federal government's constraints and underlying concerns. For the most part, the two sides were very far apart ideologically, and the conversation was one-sided.

Preparation of the Study Report

In October 1995 the first draft of a report was prepared essentially by the San Francisco Regional NPS office with the assistance of BLM officials in their state office in Sacramento and field office in Ridgecrest, California. The tribe was asked to write sections pertaining to its historical presence in and traditional uses of the area. It was also asked to respond in writing to the federal agencies' recommendations, which called for transferring into trust status on behalf of the tribe the forty-acre tribal village in Furnace Creek along with roughly 11,000 acres of disposable BLM lands outside the park. The recommendations included an invitation to the tribe to negotiate future agreements with NPS and BLM to manage cooperatively lands and resources that were of interest to it.

Over the next three months there was an increasingly hostile exchange of critiques and suggested revisions submitted by the tribe to the San Francisco office that was in turn coordinating with state and regional BLM offices. Despite the original procedural agreement that the preparation of the report would be a joint effort, NPS, with a little help from BLM, gradually took on the sole responsibility of preparing the study report. It relegated the tribe and the other agencies to a role of reviewing and submitting comments that NPS, at its discretion, revised, included, or excluded.

The tribe was particularly unhappy with the amount and location of land in the park that NPS was willing to recommend for transfer to trust status. The tribe argued that roughly one-half of the proposed forty-acre parcel was useable and that there would be no room for the tribe to build housing and tribal offices, engage in economic development, and create a viable tribal community. The BLM lands being recommended provided economic devel-

opment opportunities, but only far into the future. There was no existing infrastructure, and water was too limited to support significant residential development on these BLM parcels.

By December 1995 the tribe had become increasingly unhappy with a second draft of the study report. It was convinced that NPS had listened to little the tribe had said or proposed during the preceding seven months. The tribal negotiation team went to Washington, D.C. to persuade people at a higher level to intervene. The team members conferred with staff working with the Senate Committee on Indian Affairs and several other House committees. They also made a presentation at a meeting chaired by Assistant Secretary of Indian Affairs Ada Deer. Present at her meeting were at least fifteen directors, deputy directors, and staff from NPS, BLM, BIA, BOR, the Office of Indian Trust, and other departments.

The tribe left Washington, D.C. expecting an interagency working group to be formed in the Department of Interior that would schedule high-level meetings with the tribe.⁷ Despite the good intentions of the persons who conveyed this impression to the tribe, there was an internal agency conflict between the national and San Francisco regional offices of NPS that these people in Washington, D.C. could not overcome.

No high-level group in Washington, D.C. was ever formed, and no meetings were scheduled in the capital with the tribe. In fact, there was no further dialogue between the Park Service and the tribe from December 1995 until March 1996 when the San Francisco regional office surfaced a third draft of the study report. This new development was revealed at a meeting an NPS planner from San Francisco scheduled with the tribe in Death Valley. The location selected by NPS was a corner of the NPS fire station in Furnace Creek. There was no air conditioning and most of those invited had to sit on upturned buckets and boxes.

It was clear at this meeting that the regional director of the NPS San Francisco regional office was firmly in control. The NPS planner from the San Francisco office informed the tribe that there would be no discussions with the tribe at a higher level in Washington, D.C. He also indicated that the forty-acre Indian village in Furnace Creek was no longer recommended for transfer into trust status, and that no lands within the national park would be considered suitable for a reservation. At the same time, he asked the tribe to endorse the third draft of the study report so that it could be approved by the secretary of interior and finally submitted to Congress.

The tribal representatives were taken by complete surprise and were profoundly upset by the new development. They concluded that the intention of the National Park Service all along had been to continue its policy of forcing the tribe out of the park. As the tribe saw it, the NPS intended to be successful in implementing this policy by offering no land in the park and by persuading Congress to establish the Timbisha Shoshone Reservation outside the park on the proposed 11,000 acres of surplus BLM lands.⁸

The tribe refused to endorse the third draft of the study report or to have any further discussions with NPS. In a long letter to Interior Secretary Bruce Babbitt, the tribe warned against submitting the third draft of the report to Congress. It maintained that no study had been conducted, no lands within the national park boundaries had been seriously considered, and no consultation had been undertaken with the tribe.⁹

A RETROSPECTIVE OF ROUND ONE

In retrospect, the breakdown of the study process was predictable. From the beginning, the federal agencies and the tribe had very different notions about the intended nature and outcome of the talks between them.

The tribe perceived the process to be a negotiation between two sovereign entities. It anticipated that it would work with its counterparts to develop mutually agreed upon recommendations that would be submitted to Congress in a final study report. It looked to the meetings with the federal representatives as a forum in which the two sides could exchange information, spell out their concerns, generate options, and ultimately work out their differences. The tribe anticipated that once an agreement was reached between the tribe and the federal agencies it would be embodied in the report to Congress. The tribe believed that it would be in its best interest if the parties could come to Congress with essentially one voice. It did not believe that Congress would want to find itself in the middle of a controversy between the tribe and the Department of Interior.

In marked contrast to the tribe, the federal agencies saw their task as the completion of the study Congress mandated. The agencies saw this task as consisting of research, data analysis, mapmaking, and report writing. They saw it as a task that should and could be undertaken by staff technicians in the NPS's Pacific West Regional Office in San Francisco, in the BLM field office in Ridgecrest, and in its state office in Sacramento.

These federal agencies did not see the study as a government-to-government negotiation between two sovereign entities. They never felt that they had to come to any agreement with the tribe. Their understanding was that the study was to be conducted, in the words of section 705(b), in "consultation with the Tribe." In government parlance, the word *consultation* is not synonymous with *negotiation*. The federal representatives' expectation was that they would engage in consultation much like they do with any other constituent group. They would sit and listen to the tribe's presentations, review its data, and consider its proposals. Then the agencies would prepare a report on their findings and their recommendations. They made it clear from the outset that if the tribe dissented from their recommendations, they would be willing to describe the nature of the tribe's dissent in their final report.

The secretary of interior's office did not initially see the resolution of the Timbisha Shoshone tribe's land claim as a high-priority matter that required much attention from the secretary or his immediate staff. The few persons in the secretary's office and in the national headquarters of NPS and BLM who had anything to do with the study did not see the process that concerned only 300 Indians as a negotiation between the federal government and another sovereign. They therefore made no attempt to resolve policy questions at the top and to spell out negotiating parameters for the lower-level people representing the agencies at the table.

In light of the above, it should not be surprising that the federal representatives at the table did not respond to the tribe's initial proposals by identifying their underlying interests, offering counter proposals of their own, and trying to fashion an agreement. The representatives at the table never got any clear direction from their agencies' hierarchies. The upper-level decision-makers were

operating with a different model in mind. They saw themselves as the ultimate arbiters before recommendations went to Congress. They intended to clarify their positions with regard to trust land in and outside the Death Valley National Park only after the conclusion of the joint meetings with the tribe in Death Valley, and once the final draft of the study report was prepared.

Not being set up to conduct a negotiation with an outside entity like the tribe, the agency resolved the questions of trust land internally. Without benefit of the data and the underlying rationale that accompanied the tribe's proposals, the federal government decision-makers ultimately deferred to the position taken by the director of the Pacific regional NPS office in San Francisco. It was simpler and safer to agree that no land within the park would be transferred into reservation trust land because the action did not run any risk of setting a precedent that the national agency would have to deal with in any of its other parks.

THE TRIBE IMPLEMENTS A NATIONAL POLITICAL ORGANIZING STRATEGY

The Timbisha Shoshone tribe knew after the March 1996 that its relationship with the Department of Interior would have to change if the tribe was to have any hope of satisfying its interests in obtaining a land base. It would have to establish its credibility as a party that had to be reckoned with—one powerful enough to cost the Department of Interior more than it was willing to pay for not negotiating in good faith.

The tribe also recognized that it would have to get out from under the agency that had long dominated and controlled its destiny. While section 705(b) looked like it would finally provide the tribe a national forum to highlight its issue and advance its cause, the NPS had been effective in ratcheting the study process down to a local forum over which it again had the final word. While the study process started with a meeting in May 1995 between the tribe and over twenty-five other people from four federal agencies, it ended in a meeting in March 1996 called by a NPS planner from the San Francisco Regional Office. It had become the San Francisco regional office's report. With no semblance of partnership or consultation, the final meeting in the NPS Firehouse in Furnace Creek was on its turf and on its terms.

The tribe decided that it would never again sit down alone with its arch enemy in a position of servility.¹⁰ It knew it had to enlist the support of people who had authority over the National Park Service both within the Department of Interior and Congress. To do so, it recognized that it would have to broaden the battlefield beyond the NPS bureaucracy and increase the external pressure on the Department of Interior. In other words, the tribe had to expand its own political base before it could create the social space in which to successfully advance its case.

Moments after the fateful meeting with NPS in March 1996, the tribe issued a scathing press release. It thereby began a national political organizing campaign designed to generate political support from other tribes, national Indian organizations, congressional leaders and committees, environmental groups, courts, media, public opinion, and park visitors from the United States and abroad.

The tribe organized a national letter-writing campaign including news releases faxed to all congressmen and senators. Long letters were sent to the secretary of interior and to the White House. In addition, the tribe opened a new front: it sued the BLM for permitting gold mining in the tribe's backyard without legally required consultation. It also submitted to both NPS and BLM extensive requests for data under the Freedom of Information Act as it began to prepare a major lawsuit against the Department of Interior.

TRIBE FORMS A NATIONAL ALLIANCE TO PROTECT NATIVE RIGHTS IN NATIONAL PARKS

The tribe discovered and contacted other tribes with reservations adjoining national parks that also were frustrated with NPS attitudes towards Indians and with its implicit policy to refuse tribes the use of national park lands. The Timbisha Shoshone led the way in establishing the national Alliance to Protect Native Rights in National Parks. The organizing members included the Timbisha Shoshone, Navajo, Hualapai, Five Sandoval and Micasoukee tribes, as well as a coalition of Native Hawaiian communities and environmental groups. Many more, including the Blackfeet, Oglala Sioux, and Yurok tribes, were considering joining as well.

The alliance secured the support of the most important national Indian organization, the National Congress of American Indians (NCAI). The alliance set up a booth at NCAI's national convention and promoted the passage by all NCAI delegates of two formal resolutions that criticized the NPS and asked the secretary of interior to rectify the problems. The resolutions called for congressional oversight hearings to look into NPS's anti-Indian policies. NCAI then joined the alliance in several press conferences in Washington, D.C. The alliance began to promote the idea that NPS should have a national Indian policy and that a cross-section of tribes should be involved with NPS in formulating it.

At least two different demonstrations and information marches were organized in Death Valley National Park. Green Peace was prominently involved and information was written in several different languages and passed out to park visitors who came from all over the world. Many visitors indicated that they were appalled by the plight of the tribe and NPS's apparent policy of excluding them from park lands. Visitors also questioned why there was no mention at the park's visitor center and museum in Furnace Creek of the Timbisha Shoshone tribe's continued historical presence in and contribution to life in Death Valley. Many of these visitors made their reactions known in letters and faxes to NPS officials, congressional leaders in Washington, D.C., and to the president himself.

NEW WINDOWS OF OPPORTUNITY OPEN

What made the federal government eventually willing to negotiate with the tribe? There were probably three major factors and one minor determinant that accounted for the shift in the government's position by January 1998.

The Timbisha Shoshone tribe was eventually successful in mounting enough political pressure on NPS and the Department of Interior to persuade them to come to the table. While it did not have the power resources or political leverage to compel the department to do anything in one fell swoop, it seems to have pounded away on enough different fronts simultaneously to have a cumulative impact on swaying opinion against the department's position. At the very least it managed to become a nuisance that would not go away until the Department of Interior adopted a different approach.

By taking the offensive, the tribe put the federal agencies on the defensive. The tribe was effective in defining the issue and trying to undermine the legitimacy of the department on both moral and legal grounds. It targeted NPS for denying the tribe any land in Death Valley National Park and for effectively forcing the tribe out of the park. It maintained that NPS, and the office of the secretary of interior, which did not dissociate itself from NPS's position, were committing an American version of ethnic cleansing by trying to throw the tribe off its homelands in Death Valley and refusing to settle its age-old land claim. It maintained that the federal government was still implementing the anti-Indian policies of the 1800s in the 1990s. The tribe cited numerous examples in Indian Country and among Native Hawaiians of NPS discounting Native people's rights in the national parks.

In addition, the Timbisha Shoshone tribe alleged that NPS refusal to consider lands within the Death Valley National Park as potentially suitable for a reservation was contrary to the intent of Congress and therefore illegal. The tribe was preparing a lawsuit with this as one cause of action.

The tribe was able to generate negative publicity against NPS and managed to keep the unresolved issue in the public eye for an extended period of time. Criticisms of NPS were made in public. An increasing number of important people inside and outside government inquired privately as to why the Department of Interior could not settle the matter more amicably. These questions came from many different sources, including members of the California congressional delegation, national environmental groups such as Green Peace, Sierra Club, and the National Parks and Conservation Association, members and staff of the Senate Committee on Indian Affairs, and park visitors who cared enough to communicate with the White House and other branches of the federal government.¹¹

A key contributor to the mounting pressure on NPS was the national Alliance to Protect Native Rights in National Parks. It had broad support in Indian Country and included politically significant tribes. They all were aggressively pursuing their own agendas and were in their own right thorns in the side of NPS. Nowhere was this truer than with Micasoukee tribe, which was engaged in a raging battle with NPS over land and jurisdictional issues in Everglades National Park. This tribe was challenging NPS in court, in Congress, and in the media. The tribe was a mover and shaker in the

alliance. The Timbisha Shoshone tribe was in close contact with its leadership and its legal and public relations staff. At least in the Senate Committee on Indian Affairs, NPS was acquiring the reputation of being insensitive and ineffective in dealing with Indian tribes.¹²

There was a second factor that had nothing to do with the tribe's activities that also accounts for the shift in the federal position. There were important changes in personnel in the NPS leadership and in the interior secretary's cabinet that had a direct bearing on negotiations with the Timbisha Shoshone tribe. The past director of the San Francisco regional office of NPS retired. John Reynolds assumed this position and proved to be comfortable with the negotiation process and better able to relate to Indian people.

The other major change in personnel was Secretary Babbitt's appointment of Donald Barry as assistant secretary of fish, wildlife, and parks. Barry had become a believer in the negotiation process and in government-to-government relations with tribes by virtue of his involvement in a previous effort. He had been successful in helping to negotiate a comprehensive agreement between a national coalition of tribes and the departments of Interior and Commerce regarding how the Endangered Species Act should be implemented in Indian Country.

There was yet a third factor. Around the time the second round of negotiations began in the winter of 1998, there was a significant development in the Everglade National Park that gave NPS an added incentive to come to the negotiations table. Because NPS leadership chose to be intransigent in its dealings with the Miccasoukee tribe, Congress and Secretary Babbitt's office eventually took the matter out of NPS hands and settled it themselves. According to John Reynolds, NPS did not want to risk getting frozen out of the negotiations with the Timbisha Shoshone. NPS believed that both the Senate Committee on Indian Affairs and Secretary Babbitt wanted the Timbisha Shoshone matter resolved expeditiously.¹³

Secretary Babbitt gave Donald Barry the responsibility and authority to resolve the matter with the tribe. Barry organized an interagency working group and asked John Reynolds to lead the federal team and to coordinate its work and the internal interagency deliberations during the negotiations with the tribe.

Changes in the composition of the tribe's negotiation team also may have made a difference in the receptivity of the federal government. The former attorney and chief spokesperson for the tribe resigned after the conclusion of the first round of talks. Both were protective of the tribe's interests and became angry and cynical after NPS's surprise visit in March 1996. This was reflected in their subsequent correspondence and public pronouncements. At least from the perspective of several federal representatives who were still involved, the two tribal representatives were regarded as militant and disrespectful. They were relieved that they would not have to confront them anymore.¹⁴

ROUND TWO

The first round of transactions ended in disaster, polarizing the sides and creating more bitterness and distrust between them than existed before. The second round, beginning in January 1998, was very successful. What had changed? I previously indicated that the federal government made a significant shift in finally viewing the transaction with the Timbisha as a government-to-government negotiation. Was that enough to make the difference? In the remaining sections of this article, I analyze the negotiation process itself and identify a number of key negotiating principles that were adopted and account for the success enjoyed by both sides. The fact that both sides were now motivated to come to the negotiation table and stay there through difficult moments during the process, was extremely important.

The assessment that follows is offered within a particular framework. Negotiators must enjoy satisfaction on three different levels: (1) there must be satisfaction with the negotiation process itself (how we talk about what we talk about); (2) there must be satisfaction with the substantive results (the solutions to the problems that brought the parties to the table in the first place); and (3) there must be satisfaction with the relationship established between the parties (the degree of the trust and respect developed between them).

Process Satisfaction

There are two rules in negotiation. First, there are no rules other than those proposed and agreed upon by the parties. Every aspect of the process is negotiable. Second, unless there are some rules negotiated regarding an agreed-upon agenda, there is little chance that the negotiation will be productive. Parties will not have the sense of order, safety, and predictability they need to have an open and productive exchange of information and ideas, and to work together to reconcile their differences.

During the first round of talks between the tribe and the federal government, there were process agreements reached that were not kept. This undermined trust. For example, at the outset there was an agreement that the study report would be drafted and submitted as a joint document. With each successive draft, there was less and less evidence of collaboration. Moreover, there were other critical procedural issues that had never been directly addressed. There was no explicit understanding, for example, about whether the process was a consultation or a bilateral negotiation. Also, there was no explicit understanding about the intended outcome of the process. Was it to be an agreement on recommendations to create a reservation or a report on a government study with a possible dissenting opinion from the tribe?

The second round of negotiations was initiated by Steven Haberkamp, the tribe's consultant/advisor from Indian Dispute Resolution Services, Incorporated. During a trip to Washington, D.C. in May 1997, he met with Pat Parker, chief of the American Indian Liaison Office of NPS, to explore whether her agency would be interested in reviving talks with the tribe. She responded positively, pointing to some key personnel changes that had

occurred in the Department of Interior since the first round of talks that she believed would make the government more responsive. At this meeting, they both agreed that it would be best to make explicit procedural agreements prior to any new meetings. They hoped that this would lead to greater trust in the process that would then lead ultimately to trust in one another.

Following this initial meeting with Pat Parker at the NPS American Indian Liaison Office, there were six months of process negotiations before the first face-to-face meeting between the parties. As in round one, the tribe took the lead in proposing a process for the negotiations. The tribe sent a letter to Parker that identified a series of procedural issues and proposals that would have to be resolved before the tribe was willing to meet again.¹⁵ The tribe's letter was followed by telephone discussions and sometime later by postal correspondence from NPS. Although there were still differences that were not reconciled until the first day of the face-to-face talks in Death Valley on 15 January 1998, the parties made significant progress prior to the meeting.

The parties agreed on who specifically would represent the government and the tribe at the table at the first meeting. Initially, NPS suggested that three people from NPS represent the federal government: John Reynolds, Pat Parker, and Dick Martin, the Death Valley NPS superintendent. Intent on raising its land issue to a place high on the interior secretary's list of priorities and the talks to a level of high visibility, the tribe requested that persons at the secretarial level also be directly involved in the talks. The tribe suggested Karen Atkinson, special counsel to Assistant Secretary Barry. This was agreed to by NPS.

The tribe established a six-member negotiation team: Pauline Esteves, tribal chair; Leroy (Spike) Jackson, vice chair; Grace Goad, tribal secretary; Barbara Durham, tribal administrator; Dorothy Alther, the tribe's new attorney from California Indian Legal Services; and Steven Haberfeld, the tribe's consultant/advisor from Indian Dispute Resolution Services.

The group around the table got considerably larger but did not lose its informal and collaborative features. It was agreed that BLM should be represented by staff from its Nevada and California field offices since BLM land in both states would be discussed. Moreover, Assistant Secretary of Indian Affairs Kevin Gover designated Elizabeth Homer, director of the Office of Indian Trust in Washington, D.C., to participate on his behalf in all subsequent sessions. Representatives Doug Rollins and James Bradford Jr. from the central California office of the Bureau of Indian Affairs attended all but the first meeting in this second round. The tribe also requested that the Bureau of Reclamation (BOR) be part of the federal team since it anticipated that the availability of water in Death Valley might be used again to temper the tribe's land acquisition and land use proposals. The tribe wanted an agency independent of NPS and BLM to inform the process. NPS's initial reluctance to include BOR convinced the tribe that it was on the right track. The federal team included the BOR as a gesture of good will to the tribe.

The tribe proposed in its letter that the federal government explicitly agree to enter government-to-government negotiations and work for a written agreement describing what lands be recommend to Congress as a permanent home for the tribe. The federal government resisted consenting to negotiations until

the first face-to-face meeting on 15 January 1998 when John Reynolds explicitly agreed to include the point in the meeting's official framework. As late as 22 December 1997, in the official response to the tribe's letter recommending a specific process, Pat Parker wrote: "It is important that all parties understand that the study process is not a negotiated agreement." She went on to write that the

statute authorizes the Secretary to conduct a study in consultation with the Timbisha Shoshone Tribe and the study process will reflect that direction from Congress. We very much want to reach agreement with the Tribe on a collaborative process for completing the study in consultation with the Tribe.... It is our hope an "interest-based consultation" will assist us in clarifying what both sides need to have addressed in the process of completing the Study.¹⁶

The tribe still had to persuade the federal team that the purpose of upcoming meetings were to negotiate a bilateral agreement with the tribe on what would be specifically recommended to Congress—not just an agreement on how the study was to be completed.

The tribe proposed and the federal government consented to jointly define what additional studies would be needed and to collaborate in gathering and assessing data. The tribe initiated this proposal because it believed that the federal representatives during the first round had raised the need for further study as a ruse for delaying the process, and for not reaching any agreement with the tribe. The tribe did not want any open-ended study process that could take years to complete. It proposed that before initiating any study, the parties should decide on the specific research questions, the scope of the research, the availability of existing secondary and primary data, the data still being sought, the projected costs, the sources of information, and the length of time required to complete such a project.

The tribe proposed that the federal government engage in interest-based negotiations (IBN). The tribe pressed for this approach because it believed that underlying interests, concerns, and principles should be the focus of the discussions rather than specific proposals. It felt that if both sides were explicit about their general needs, then both parties would have information they required to fashion proposals that would accommodate both sides' interests. In its letter to Pat Parker, the tribe proposed that both parties design a process "that would facilitate a full exchange of information and the full exploration and consideration of options."¹⁷ Interest-based negotiations foster this kind of exchange much more readily than traditional close-to-the-chest, competitive style, positional negotiations. The tribe, in the same letter, laid out its nine basic interests and asked the federal government to be "forthcoming with respect to its interests or underlying concerns." The hope was that a dialogue would ensue regarding mutual needs. In its letter to Pat Parker, the tribe wrote:

The Tribe understands that the federal government will have concerns (interests) regarding the location, size and legal status of the Tribe's presence, and regarding the scope, nature, aesthetics, and

coordination (with NPS) of the Tribe's activities. However, it hopes that this time the government can make these concerns explicit so that there can be a full discussion of the perceived obstacles and the possible modifications, re-configurations and alternatives in an effort to accommodate mutual interests. A true win/win solution will depend on the full exploration of how the interests of both parties can be satisfied to an acceptable level.¹⁸

In its November 18 letter to Patricia Parker, the tribe listed its interests and indicated that it wanted the federal government to respond to them at the first session. The tribe listed its interests as follows:

- a. co-existence with the Tribe in Death Valley,
- b. establishment of a permanent homeland in traditional ancestral land areas falling within today's National Park boundaries,
- c. establishment of housing clusters close to schools, services and physical infrastructure (roads, electricity, water and sewage, etc.), in locations in and near Furnace Creek,
- d. use of its traditional summer camping areas for seasonal residence, harvesting, stewarding land and natural resources, etc.,
- e. location of its government headquarters and community and human service programs in and near Furnace Creek,
- f. preservation and development of its own dynamic culture by living as a community on its ancestral lands,
- g. economic and employment development activities, particularly in low- impact eco-tourist development,
- h. active involvement in the protection and preservation of the environmental (water, vegetation, wild life) and cultural resources of the Death Valley area and,
- i. being an integral part of the Death Valley National Park's landscape and program by presenting/interpreting its own history and culture to Park visitors.¹⁹

In the government's formal reply to the tribe's November 18 letter, it agreed that there should be "a full discussion of underlying concerns and interests." However, it initially resisted the tribe's suggestion that the first meeting be the occasion for outlining and responding to each other's interests. In her reply to the tribe, Pat Parker wrote that the tribe's nine interests "must be discussed as part of the study process," and that "it will not be possible to discuss all of these matters at the first meeting."²⁰ This question was left open until the first meeting when the tribe's negotiators asked John Reynolds directly whether his team was prepared to address and respond to the tribe's list of nine interests. His answer was yes, and he proceeded to discuss them one by one.

The parties agreed to invite an impartial third party to facilitate the negotiations. Charles Wilkinson, a prominent law professor from the University of Colorado Law School in Boulder, was selected as the facilitator. He had been involved in the negotiations between Indian tribes and the departments of Interior and Commerce over the application of the Endangered Species Act in Indian Country. He knew Secretary Babbitt and Assistant Secretary Barry

personally and enjoyed their confidence as well as that of others in the Department of Interior. Moreover, he was regarded as one of the foremost experts in Indian law and other matters of great importance in the West, including water rights and use. Wilkinson previously worked on the staff of the Native American Rights Fund (NARF), a highly regarded and effective national public interest law firm working on behalf of Indian tribes. The tribe was persuaded to have Wilkinson serve as the facilitator by its observation that he was a fair-minded person dedicated to the notion Native sovereignty. The tribe believed he would help protect the integrity of the negotiation process and be witness to any effort by the federal representatives to undermine or thwart it.

The tribe sought to clarify two additional issues before the face-to-face negotiation sessions began in Death Valley. The tribe asked the Department of Interior to declare explicitly whether or not land within the Death Valley National Park would be considered suitable for a reservation. The tribe wanted an explicit yes or no answer at the outset, thereby limiting the number of surprises and maximizing predictability. Pat Parker did not address this question in her follow-up letter. However, John Reynolds replied to it in his opening statement at the January 15 and 16 meetings in Death Valley.

The tribe also asked the federal government representatives to “get explicit instructions before and engage in an ongoing dialogue with their hierarchies (ratifiers) during the extended negotiation process” that was to follow. In its letter to Pat Parker, the tribe wrote: “it would help foster trust and understanding at the table, if representatives at the table have a pretty clear idea of what will be acceptable to their ratifiers when they are ready to send recommended settlements up for approval.”²¹

Once again, Pat Parker did not address this request in her follow-up letter. However, it became quite clear from the outset of the second round of talks that the federal government also understood the importance of regular internal dialogue within each agency’s bureaucratic hierarchy and among the agencies at the highest level. It was evident that the federal representatives convened many meetings and conference calls to prepare for the upcoming meetings with the tribe. The interagency working group assembled by Assistant Secretary Berry to coordinate the effort had already been very active.

The first meeting between the tribe and the federal agency representatives in Death Valley, first scheduled for 10 and 11 December 1997, was postponed to January 15 and 16. With little more than a week before this meeting, the tribe was notified that Deputy Assistant Secretary Barry wanted to first meet with tribal representatives in Washington, D.C. He indicated he had been asked by Bruce Babbitt, secretary of the interior, to “coordinate a renewed effort by the Department of Interior to complete the study authorized by Section 705(b) of the California Desert Protection Act.”²²

The assistant secretary assured the tribe that he would track the progress directly and that he expected negotiations between the US government and the tribe to be conducted on a government-to-government level. He also indicated that he expected negotiations to produce an agreement to take to Congress.

The members of the tribe's negotiating team were not exactly sure why they were summoned to travel all the way back to Washington, D.C. However, they hoped that Barry's decision to kick-off the process meant that the secretary's office was finally committed to a collaborative process to resolve its dispute with the Timbisha Shoshone, and that Barry—not NPS—would call the shots during the second round.²³

The tribe used its visit in Washington, D.C. to meet with the staff of the Senate Committee on Indian Affairs. The tribe had been in periodic communication with these members of the Senate staff ever since the battle to insert section 705(b) into the Desert Protection Act began. At this meeting in the beginning of January 1998, these Senate staff people conveyed their growing concern about NPS's past records of dealing with tribes. They once again let the tribe know that Congress did not want to resolve any differences between the Department of Interior and the tribe. They hoped that Secretary Barry's involvement would facilitate "a new model for future transactions between NPS and tribes."²⁴

The first face-to-face meetings took place in mid-January 1998 in the tribal offices in Death Valley. The greater part of the first day was devoted to developing and agreeing on a framework within which to work for the remainder of the negotiations. Most of the framework's components were products of the procedural negotiations that had been held on each side and between the sides leading up to this first meeting. Much of what was accomplished formalized what had already been agreed upon.

The parties agreed to the following framework: (1) there was an acknowledgment of a "special political relationship, including a trust relationship, between the Timbisha Shoshone Nation and the United States"; (2) the parties would engage in "bilateral government to government negotiations between the two sovereigns"; (3) the parties would participate in negotiations that would be "intended to lead to a specific, formal proposal for achieving a Timbisha Shoshone homeland"; (4) the representatives would serve as the "core group" of negotiators from the federal team and the tribe's team who would make every effort to attend all meetings; (5) representatives "had the responsibility to follow-up and get answers promptly" when matters discussed required ratification at a higher level (if a recommendation was rejected, the representatives also agreed to explain why); (6) all agendas for future sessions would be jointly developed; (7) any party could call a caucus at any time to facilitate internal team negotiations and agreement; (8) confidentiality of the proceedings would be protected by an understanding that information shared with external persons, including the press, would be limited to a report on the issues under discussion and the status of the process; (9) summaries of the discussions, including all understandings reached, would be kept for each meeting (Pat Parker with NPS agreed to be the official recorder); (10) the parties would complete four studies (corresponding to four land areas in which the tribe was interested) by "working jointly as governments and in full cooperation"; and (11) as part of the framework, the parties listed thirteen "interests" or principles they would work to fulfill. They included the nine interests the tribe spelled out and NPS had four of its own.²⁵

Creating Substantive Satisfaction

Substantive satisfaction is realized when the problems or issues are resolved in such a way that all parties' interests are satisfied to an acceptable (not preferred) level. In order for this to occur, parties must be aware of their interests, make these explicit in discussions with the other side, and be motivated to simultaneously advance their interests while accommodating the interests of the other parties. This approach is a prerequisite to a win/win agreement.

Over the next nine months, the two teams met a total of six times for two to three days at a time. During this entire time there was no major stumbling block that the parties were not able to overcome. This can be attributed to two things. First, a great deal of time and effort had been spent setting the stage for the negotiations. Procedural agreements were reached which provided safety and predictability to all parties. Second, both side's original expectations of possible outcomes had been lowered by the actions of the other side. Both had become more realistic. The federal government realized that there would have to be some accommodation of the tribe's proposals for permanency in the park. The tribe realized that it could not have hundreds of thousands of acres transferred to trust status. Finally, both were to realize, as negotiations got under way, that they could satisfy their interests (tempered by more realistic expectations) if they did not get locked into their original positions and proposals.

In the summer and fall of 1997 the tribe met to prepare for the possibility of renewed negotiations with the federal government. The focus was on reviewing the past experience and modifying its prior negotiation strategy. The central questions were whether and how it could satisfy its interests without having all the land it previously requested be transferred to trust status.

Tribal representatives concluded that asking again for large parcels of trust land in the national park (5,000 acres in Furnace Creek and some 750,000 acres in the western part of the park) would be problematic. Even though the tribe was convinced that it had a strong moral position and could rationally justify the request, it realized that the political realities dictated more restraint.

The tribe expected that Senator Feinstein, the senior and influential senator from California, would play a pivotal role in passing any legislation needed to put a negotiated agreement into effect. Death Valley is in her state and the California Desert Protection Act was her piece of legislation. The tribe surmised that she would not allow large segments of park land to be transferred to the tribe. The tribe believed that if Congress was asked again to make major changes in land tenure in Death Valley, Senator Feinstein and others in her coalition would be afraid that the Desert Protection Act could be reopened and unraveled by the political opposition.

There was one final consideration. The Timbisha Shoshone, like most tribes, have a running quarrel with the environmentalists who typically fail to appreciate Indians' historical roles in protecting the environment. According to the standard approach promoted by environmental groups, the only way to protect the land and resources is to prevent access and use by human beings, even by Indians who were part of the ecological equation for thousands of years prior to the arrival of the first European. Based on preliminary conversations

with some environmental groups, the tribe believed that the environmental organizations had little confidence in the Indian people's commitment to environmental protection and that they feared they would lose all control over land taken into trust status.

The tribe also expected NPS to resist the transfer of large amounts of park land to the tribe because other tribes with ancestral claims on national parks would use the Timbisha Shoshone example as a precedent. The tribe feared that NPS would use the organized political power of the environmentalists, including its closely allied National Parks and Conservation Association, to resist and reject the tribe's proposals for trust land, especially if it was still talking about large parcels.²⁶

There were two primary reasons the tribe requested land during the first round of talks with the federal government. First, it had an interest in establishing a viable self-sustaining tribal community in perpetuity. To meet these interests, the tribe needed enough land on which to build permanent homes, deliver health and social services, house and operate its government, and engage in business development.

The second reason the tribe initially requested land was that it had a deep and abiding interest in getting back on the land to actively steward the resources after sixty-five years of being prohibited from doing so. Timbisha Shoshone do not see land as simply a piece of real estate, separate from themselves, that can be acquired and transferred, bought and sold. The people are an integral part of the landscape and life of the desert, they have an intimate relationship with the mountains, valleys, plants and wildlife, springs and streams. Moreover, they believe they are not passive participants in this organic whole, but have a historical and spiritual responsibility to protect and cultivate life in all its forms and help maintain the ecological balance.

The tribe was prepared to take a different approach during the second round of talks with respect to both lands for a self-sustaining community and lands for stewardship. With respect to the former, it was willing to consider legal alternatives to trust land, as long as the federal government could convince it that certain basic conditions would be met. The land area would have to be within its ancestral homeland; large enough to accommodate its residential, service, governmental, and economic development activities; and near adequate physical infrastructure and social amenities. The tribe would have to be guaranteed the right to occupy this land in perpetuity, and able to exercise sovereign authority over the activities on this land. The tribe recognized that the latter would be a precondition it must meet to successfully obtain any grants or loans from the government or private foundations to build housing, tribal government offices, community facilities, and business enterprises.

With respect to the tribe's interest in having land to once again fulfill its role as steward, the tribe was also willing to consider alternatives to trust land if there could be certain guarantees in the legislation. The tribe wanted the assurance that the land areas of interest were physically and publicly designated as being of special historical and spiritual importance to the tribe. Moreover, the tribe wanted guaranteed unrestricted access and opportunities

to be actively involved in restoring, preserving, protecting, and enhancing natural and cultural resources such as wildlife, springs, native vegetation, traditional food sources and medicinal plants.

It should be understood that the decisions made during the second round of talks with the federal government to limit the request for trust land and consider alternatives to trust status were made in a special political and historical context that helped lower the tribe's expectations. The tribe preferred to take over its entire ancestral area from NPS and BLM, entities the tribe still regards as interlopers with little understanding of the desert and how to care for it. The tribe did not see this as a possibility now. Second, the tribe maintained the entire area (approximately 8 million acres) as its homeland, regardless of whether the federal government recognizes this or not, or whether NPS occupies it or not. Chairperson Pauline Esteves made it abundantly clear in private caucus and in the full session that by agreeing to only a small section of land to be transferred to tribal ownership, the tribe has no less a connection to the remaining areas and no less a sense of responsibility for being present and actively involved in stewarding them.

During the procedural negotiations between the tribe and the federal government, the tribe asked the federal government to lay out the concerns that it would want addressed in any agreement. At the beginning of the second round of talks, the federal team leader John Reynolds commented on each interest on the tribe's list and essentially accepted these as principles that the ensuing negotiations would seek to satisfy.

In the course of the talks, NPS's interests became even more clear. NPS has an overriding interest in promoting and protecting a certain ambiance and aesthetic in the Death Valley National Park which is consistent with providing visitors a desert experience. Toward this end, NPS has an interest in limiting the number and size of any new physical improvement. In fact, it is today official National Park System policy to encourage all future commercial development designed to meet visitor needs to locate outside park boundaries.

With this strong interest in providing a specific type of experience to its visitors, it is not surprising that NPS would be apprehensive about having an Indian reservation within park boundaries. It would be an area over which it would not have complete authority and would consequently be limited in its ability to protect and enforce the particular park's special ambiance and aesthetic.

The NPS's expectations were also modified significantly from what they had been in 1995 and 1996. The Timbisha Shoshone tribe could not be removed from the park. This was not politically feasible even though from its perspective it might have been easier to manage the park without having to deal with an outside entity like an Indian reservation. Once the tribe's continued presence was accepted as inevitable, NPS's interests were reordered: complete autonomy and control by NPS within the park boundaries gave way to its concerns for maximizing predictability and containment.

On one hand, NPS had an interest in ensuring that the tribe and its members be able to develop and sustain a viable community. It was in NPS's interests to avoid putting the tribe in a situation where it could only afford substandard conditions and would have no way to become economically

self-sufficient. An impoverished tribal community inside the park could ultimately threaten the park's aesthetics and might also reflect badly on NPS's reputation. It might appear that NPS was keeping the tribe in a subjugated position.

On the other hand, NPS wanted to define, and thus predetermine, the parameters (size, type, location, aesthetic, and the like) of this development as much as possible in the negotiated agreement. NPS's interests in predictability and containment led it to support creating a comprehensive agreement in which other lands outside the park were also included in the package. Other parcels outside the park could eventually serve as sites for viable residential and economic development once the site in the park's Furnace Creek area reached an agreed capacity. In this way, NPS could protect itself against future demands for more space and tribal activity within the park many decades in the future. It could ensure that the special ambiance and aesthetic in Death Valley National Park would be protected now and forever.

John Reynolds and the federal team began the substantive negotiations on 15 January 1998 by making a major gesture to the tribe. He indicated that the federal government was prepared to consider the tribe's village area in Furnace Creek as the permanent location for the tribe's major activities, including residences, tribal government centers, community and recreational services, and modest visitor-related business development. He indicated that the Department of Interior recognized that Furnace Creek not only was historically important to the tribe, but also was the only location within the tribe's homeland that currently offered the tribe the preconditions for developing a viable community. He had in mind access to sufficient water, physical and social infrastructure, and a reliable tourist market for local economic development activities.²⁷

NPS and the tribe went on to informally agree to begin negotiations without taking a position on trust land status in the park. The corollary understanding was that the tribe's interests in having a permanent presence and the exercise of tribal sovereignty on land parcels reserved for the tribe would be satisfied. The major stumbling block during the first round of talks—trust lands or no trust lands in the park—was thereby sidestepped. Trust status would not be ruled out but other legal arrangements that could satisfy the tribe's interests would be explored first. In the final analysis, there were no such legal arrangements identified, and trust status was agreed to.

The ensuing negotiations further highlighted the virtues of interest-based negotiations and the need to avoid what are considered positional negotiations. Instead of the parties arguing over the size of the Furnace Creek parcel by each arbitrarily reaching for a number and then vigorously defending it, they decided to come up with the size only after the interests, with regard to the use of the parcel, were met. It was agreed that it had to be of a size sufficient to enable the tribe to create a viable community with adequate space for housing, services, and economic development.

John Reynolds suggested a way to address still unanswered questions about the size of parcel in Furnace Creek. He offered the tribe the services of

landscape architects and community planners from the National Park Denver Service Center. He offered to have the center work with the tribe as their client to prepare drawings of their concepts of a tribal village that contained all the anticipated physical facilities. NPS offered to pay for these services because of the tribe's meager resources. After its initial meeting with two individuals who John Reynolds recommended, the tribe accepted the offer and met with them again in Furnace Creek on at least four separate occasions.

The tribal and federal negotiation teams used the next several meetings during subsequent months to review the drawings and recommendations that arose out of the tribe's discussions with NPS architects and planners. It was ultimately agreed that the tribe's forty-acre village would be enlarged to 300 acres. A parcel of this size was needed to accommodate up to fifty homes, tribal offices, and recreation and community services. The parties also agreed to low-impact visitor-related service businesses, including a tribal museum and cultural center, a retail gift and Indian crafts shop, and a small to medium sized upscale desert inn owned and operated by the tribe.

Here was another instance in which interest-based negotiations helped to avoid a major confrontation. In trying to give the small to modest sized inn more definition, the park and tribal negotiators began to argue about the number of rooms that could be built. The tribe proposed one hundred rooms while the park proposed twenty-five. The question was resolved when the tribe asked that the inn's financial viability ultimately be the criterion for determining the size. At a minimum, the tribe wanted the inn to be large enough to generate net income that was consistent with industry standards. This too made sense from the perspective of NPS's interests, for NPS did not want the inn to be a financial failure. That would be contrary to its interest in sustaining a productive and successful Indian community. Anything less would undermine the image of the national park. The parties agreed that it was premature to decide on the maximum number of rooms until the tribe was ready to launch the enterprise and the needed financial information was available.

The two negotiation teams also agreed that they would jointly develop building standards that would apply to all new physical developments in the park. These would incorporate the parties' mutual interests in environmental protection and architectural compatibility with the park. Standards were an additional way to ensure that the inn's size would be something both the tribe and NPS could agree to when the time came for development and implementation.

The 300-acre parcel is significantly larger than the former forty-acre village site on which the tribe has squatted for almost sixty-five years. However, it is also much smaller than the 5,000 acres in Furnace Creek the tribe had proposed be transferred to trust during the first round of talks several years before. On the surface, it appears that the tribe gave up an enormous amount. However, other provisions in the agreement that pertain to this area in Furnace Creek help again to illustrate the merits of interest-based negotiations.

In addition to the 300 acres of trust land reserved for tribal development activities, the parties agreed to a contiguous buffer zone of about 500 acres

which would separate the tribe from the main road and the park visitor area, and would protect known archeological sites. Also, approximately 3,000 acres adjoining the 300 acres on the other side will be set aside as a special-use area for the tribe with limited access allowed to park visitors. This large parcel contains one of the largest mesquite groves in the park and provides the mesquite beans that have long been the primary food staple of tribal members. The tribe will once again have full use of this cultural resource and be free to engage in traditional cultivation and harvesting practices to sustain the yield. Neither the buffer nor the mesquite areas will be transferred to trust status, yet the tribe's interests regarding these areas and resources will be satisfied.

In later negotiation sessions, discussions shifted to the western area of the park. This covers a vast area of about 750,000 acres of special importance to the tribe because of its spiritual sites and historical and traditional uses. The tribe longed to return to the area for gatherings, summer camping, and springs, wildlife, and vegetation restoration.

In lieu of proposing to bring this area into trust status (it is now almost all under the "wilderness" designation), the tribe proposed designating it the Timbisha Shoshone Natural and Cultural Preservation Area. While it will remain part of the Death Valley National Park under the same legal status as before, official park maps will reflect the new designation and thereby inform park visitors of the area's special connection to the Timbisha Shoshone tribe. It will also be a priority area for developing new cultural and natural resource co-management projects among NPS, BLM, and the tribe.

This proposal, along with a request for NPS setting aside a five-acre parcel for an office and storage shed for a tribal staging area, was ultimately agreed upon. While no trust land was designated, the tribe's interests in having guaranteed access and a very active role in stewarding this vast area were satisfied. In addition, the special designation that will become part of the congressional legislation is of enormous symbolic importance. After sixty-five years of having no legitimate standing in the park and no official recognition by NPS that the tribe was anything more than part of Death Valley's ancient history, the tribe was pleased to literally find itself on the map and accorded the respect it is due.

The interests of the federal government were also met with this provision of the agreement. NPS was able to satisfy the tribe's interests without having to set aside trust land. Moreover, NPS is mandated to protect the park's cultural and natural resources. The tribe's traditional activities and practices, and indeed the tribe itself, are some of the park's most important cultural resources. Moreover, NPS seems to be embracing a new resource management philosophy by acknowledging that Indian people can be integral to resource protection. By agreeing to designate the special protection area, it indicated that it is today willing to work with the tribe to reintroduce its traditional resource management practices in hopes that these will help restore vegetation, water sources, and wildlife.

NPS complemented this gesture with a proposal to amend, as part of the congressional legislation, the official purposes of Death Valley National Park.

Furnace Creek Cooperative Activity Areas

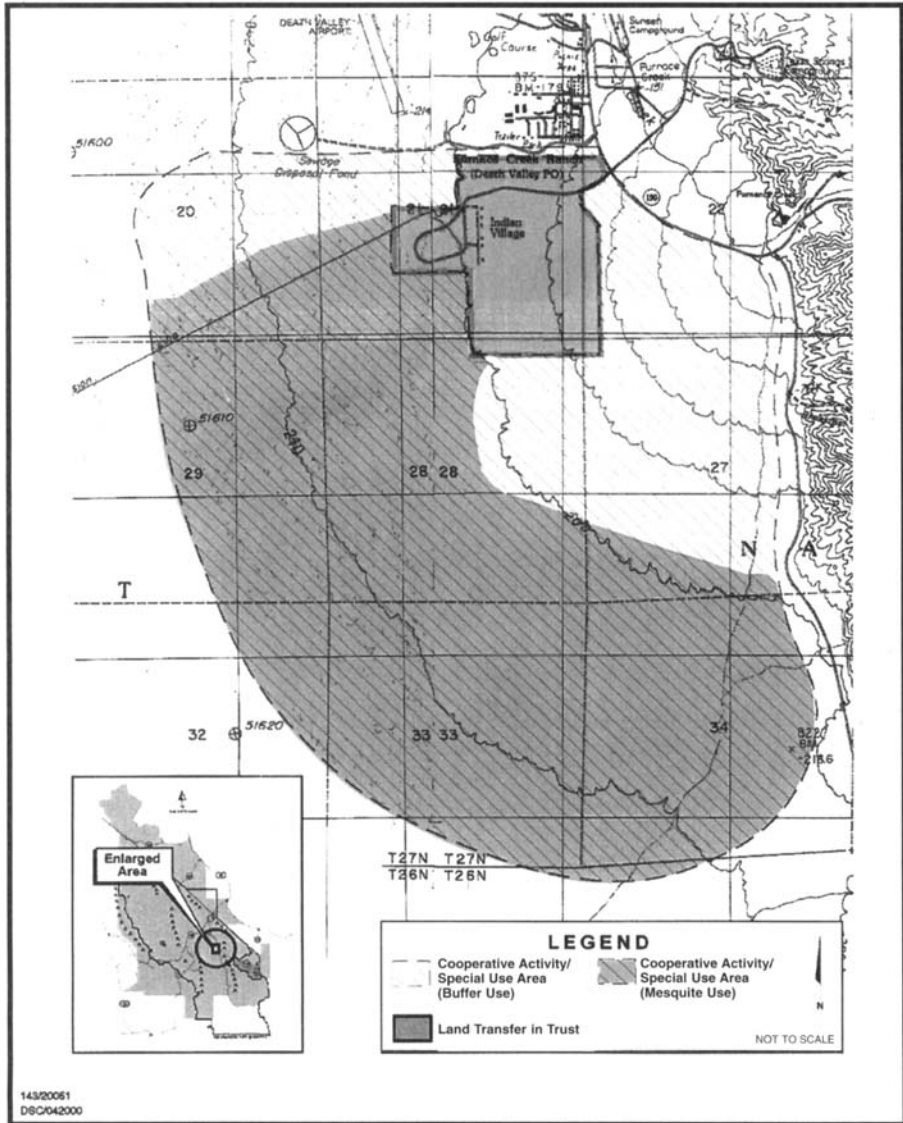


FIGURE 3. Source: Bureau of Land Management, 2000.

According to the agreement, it will recognize the contributions of the Timbisha Shoshone tribe to the history, ecology, and culture of Death Valley National Park and other portions of their ancestral homelands. It will also recognize that the continued presence of the tribe in the park and other parts of its ancestral homelands benefits the park and the American people.

Once the issues pertaining to the acquisition and use of lands in Furnace Creek and the new Timbisha Shoshone Preservation area were resolved, the parties reached an agreement to take into trust for the tribe four additional parcels. One of these was in the park and the other three were lying outside the park and being managed by BLM. All four parcels are of substantial historical importance to the tribe. In addition, they all lie along main access routes into the park. At least three parcels east of the park possess some limited future economic development potential as well as some opportunity for very limited residential development once viable commercial enterprises are up and running. The major constraints on each of these parcels are limited water resources. These four parcels consist of approximately 7,240 additional acres.²⁸

In addition, the parties agreed to recommend the purchase of 120 acres of private land in Saline Valley, and a private ranch adjoining one of the BLM parcels, an additional 2,160 acres. According to the tribe, this ranch, along with its substantial water rights, belonged to tribal members before these had been illegally taken from them several generations before. Of all the parcels outside the park, this ranch is the only one that has the infrastructure and, most important, sufficient water to support a viable residential community. It is the only location that promises to provide the tribe with a long-run solution to its residential needs once it outgrows the Furnace Creek site.

NPS, much like the tribe, viewed the purchase of the private property as a long-term insurance policy. It has a strong interest in avoiding tribal demands for more space inside the park once it outgrows Furnace Creek. NPS was engaged in a bitter struggle with the Miccasoukee tribe in Everglades National Park for similar reasons, and it wanted to avoid this with the Timbisha Shoshone.

Creating Relational Satisfaction

Negotiations are more than a mechanical exercise of setting up a process and exchanging proposals until an agreement is reached. They are a human interaction between people with different feelings, attitudes, values, perspectives, memories, and personalities. What happens among the people at or away from the table during negotiations will have a direct bearing on how successfully the issues are resolved and how the parties will work together and resolve differences in the future.

When people remain suspicious of one another's intentions, are reluctant to reveal their reactions and concerns, and withhold crucial information, they may still be able to be cordial and muscle through the negotiation process to arrive at a final agreement. But the results will be far different when the parties have a chance to reach out and meet each other at a deep level. When people experience a positive chemistry, have candid interchanges, accept that they will have different perspectives on the problems, enjoy humorous exchanges, reveal heartfelt hopes and reactions, get to know each other during breaks, and even sit down together for meals, agreement will be reached

out of the strength of the relationship. The good will accumulated in the course of building the relationship will be there to draw upon during the difficult moments of the negotiations and later when resolving differences that may occur while implementing the agreement.

Generally speaking, building relationships between the parties in a negotiation is not a top priority in contemporary mainstream America. This dimension of the negotiation process is neglected both in private and public sectors where it is regarded as time-consuming and therefore inefficient and costly. Meanwhile, it is of paramount importance throughout the rest of the world, especially in countries in which the modern industrial economy and its dominant values have not taken hold completely. There are countless stories about American businessmen, interested in increasing their business abroad, who are bewildered at the behavior of their foreign counterparts. Instead of being immediately interested in getting down to the task of making a deal, all their counterparts want to do in the initial stages of contact is spend social time together.

American Indian tribes historically talked business only after initiating relationship-building activities. Gift giving, feasts, formalized games and contests, and storytelling were among the activities that served to establish bonds between the parties. They were also a means of gathering important information about the other's values and character before initiating actual substantive negotiations. To this day, there is a major cultural preference among current American Indian leadership to connect on a personal level before engaging in substantive negotiations. Despite having this strong cultural difference, however, it does not always play itself out because Indian negotiators do not insist on, or are not accorded the opportunity to propose, building this cultural preference into the negotiation process.

Today there is debate among academics and some practitioners in the field of conflict resolution over whether there can be successful negotiations if there is no trust among the parties. Our position at the Indian Dispute Resolution Services is that parties to a conflict generally do not trust each other before they enter negotiations. However, if they do not themselves create the conditions under which they can begin to have more trust, it is highly unlikely that they will be successful in reaching anything more than the most rudimentary and fragile agreement. The difference between a successful and unsuccessful negotiation will be less a function of whether the parties begin by trusting one another, and more a function of whether they are successful in overcoming their initial distrust.

In this particular negotiation in Death Valley, the parties started with great apprehension and distrust. The tribe's experience with NPS over the past sixty-five years was bitter and oppressive. Years of various efforts by NPS staff to drive the remaining tribal members out of the park, the suspected role of NPS in preventing the tribe from getting a reservation at the time of its federal recognition, its opposition to including section 705(b) in the California Desert Protection Bill, their later reluctance to meet with the tribe to conduct the congressionally mandated study, NPS's behavior during the

first round of talks, and its ultimate decision not to consider any land in the national park suitable for a reservation, were all deeply embedded in the tribal negotiators' memories.

The federal team was also apprehensive. Its members knew that the tribe had been angry and embittered by its earlier experiences. Many had read the correspondence from the tribe after the first round, and were stung by the personal accusations and the motives that had been imputed. They felt that they and their agencies had been unfairly maligned by the image painted by tribal members and consequently misunderstood by the media, politicians, and organizations now critical of them.

Considerable time and energy were spent defining a mutually acceptable process to follow before the two teams ever met face-to-face to discuss substantive issues. It is undeniable that making and keeping procedural agreements were important building blocks in this negotiation. However, the human factor, the relationships that developed between the parties over a period of nine months, played an equally important role in creating a sense of trust and safety.

People at the table developed some close personal connections with certain members of the other team. This provided the glue that both held the process together and seemed to lubricate it as well. One can speculate about the reasons strong relationships developed during the second round and not during the first. Clearly, there was one process decision reached at the outset of the second round that was particularly helpful. The parties agreed to limit the number of people who would sit at the table and to identify a core group of people who would consistently represent their organization and attend all the sessions without sending alternates. This made people feel that they could count on each other to have a strong commitment to the process. The continuity in group membership also gave each participant an opportunity to really get to know the others over time.

As a general rule, when people are isolated from outside influences and have intense experiences together, they form strong bonds. Over the nine months of intense negotiations, the negotiators met for two to three days at a time, sometimes until midnight. They stayed at the same hotel and usually ate meals together. This concentrated time together—time not always devoted to business—gave people an opportunity to experience each other as more than cardboard cutouts sitting across the table from them. They learned about one another's personal histories, values, opinions, and commitments. They started to develop a sense of whether they could trust one another as human beings, outside and beyond the role they served in representing an agency or the tribe.

In addition to the structure of the negotiation being conducive to relationship building, there just happened to be good chemistry between some key individuals who participated in the process. This was due to sheer luck. Their good humor and occasional lightheartedness, and their shared optimism and mutual respect, created a momentum and positive spirit that energized the negotiations.

These emerging personal relationships became the basis of an informal communication network that operated on a track parallel to the formal negotiations. The large number of representatives at the table, often seventeen to

eighteen people, made it cumbersome at times to clarify understandings in any great depth. Some of the negotiators compensated for this by working through their own personal contacts on the other team. They used these contacts for more one-on-one discussions, to gain better understanding of why some things were done or said at the table, to develop and sustain trust between the two teams, and to prepare people on the other side for announcements, responses, or proposals that would be made later at the table. These informal contacts all helped eliminate the element of surprise—the natural enemy of successful negotiations.

CONCLUSION

The story of the Timbisha Shoshone tribe's long, yet ultimately successful, struggle to get some of its ancestral land back is an interesting and satisfying account of how a handful of Indian people were able, against overwhelming odds, to redress a historical injustice committed by the US government.

The Timbisha story also provides important insights into the conflict-resolution process, demonstrating what works and what does not. It sheds particular light on the role of power in negotiations, and on certain underlying assumptions commonly made about the merits of win/win approaches to problem-solving.

There is a widespread effort in this country, both in academia and among practitioners, to promote nonadversarial, mutual-gain approaches to conflict-resolution, such as interest-based negotiation and mediation. It has become commonplace to note that win/lose conflict-resolution strategies (such as litigation) are undesirable because they are costly to the parties involved and to society in general. They are time consuming (sometimes they go unresolved for many years), they create substantial financial and emotional burdens, they almost always do more damage to the relationship between those involved, and more often than not, because of continued dissatisfaction, they lead to subsequent conflict between the parties.

These observations are generally made in the context of critiquing our society's heavy reliance on litigation to settle even the smallest disagreement. By extension, however, it should also be obvious that similar costs occur in any conflict outside court in which either one or both parties try to win by ignoring, dominating, or subduing its adversary.

In contrast, the win/win approach is increasingly considered the preferred way to resolve conflicts. It avoids some costs associated with win/lose strategies. Specifically, the nonadversarial mutual gain approach (such as negotiation and mediation) is quicker and less costly, and maintains relationships, addresses underlying problems, and is not likely to lead to subsequent conflict because the parties are more willing to live up to agreements they have reached together. In win/win, all parties usually feel like winners and have less motivation to renew the fight.

The logic of these comparisons is compelling. However, the essential problem is that the win/win approach works best when the parties are evenly matched. Where there is a balance of power between the parties, the parties

recognize their interdependence and anticipate that the other party can exact a heavy price if they act unilaterally. Both parties are then motivated to satisfy the interests of the other party for pragmatic reasons. They know that the other party will have to win something significant, too, before it is willing to enter any agreement. Where there is a balance of power, each party will be motivated to make the other a winner.

But what happens when one party perceives itself to have the power to act unilaterally without the fear of significant retaliation? If it perceives that it can have its own way, will it not be reluctant to negotiate and work out a mutually satisfactory solution with the other side?

The transactions between the Timbisha Shoshone tribe and the federal agencies over the years reveal an important limitation of the win/win approach. If one party is perceived to have little power, it cannot get into the game. It does not matter whether it is committed to using win/win strategies to resolve conflict. It is not an option as long as the other side is unwilling to negotiate.

During the first round of talks, the tribe was regarded as an insignificant threat to the interests of the federal government. The federal government persisted in making decisions unilaterally and refused to negotiate with the tribe. This changed only after the tribe pulled out of the talks and launched a national political organizing campaign that successfully embarrassed NPS and the Department of Interior. Only then did the federal agencies perceive that they would pay a heavy price for continued intransigence. Once the agencies acknowledged the new "power" relationship, approached the tribe as an equal, and chose to negotiate with it in good faith, the evidence was clearly in support of the win/win model. The proposition that conflict is best resolved by the parties themselves through an open discussion and the mutual satisfaction of underlying interests was proven over and over again.

Potential Impact on Future Tribal/Federal Government Relations

What, if any, impact will the mutually satisfying agreement between the Timbisha Shoshone tribe and the Department of Interior have on future relationships between Indian tribes and the federal government? Will it serve as a model that will be replicated? Will it establish any precedent? Will the federal government abandon its win/lose approach with Indian tribes? To begin to answer these questions, we first have to look generally at the current context of federal government/tribal relationships.

During the past three hundred years, the relationship between the federal government and American Indian tribes has been lopsided. Congress and various presidential administrations have unilaterally decided the fate of the Indian people and very rarely enlisted them in any dialogue. Essentially, this has been a win/lose relationship, with tribes consistently finding themselves the losers. For generations, tribes that wanted to sit down and negotiate could not get the federal agencies to come to the table. Often, tribes could not even get agency officials to return their phone calls.

President Clinton, in April 1994, issued Executive Order 12875, entitled, "Government-to-Government Relations with Native American Tribal

Governments.” President Clinton promised to make a dramatic and fundamental change in how the executive branch of the federal government would relate to American Indian tribes. He called for the explicit recognition of tribes’ special status as separate sovereign nations and thus for the implementation of a government-to-government relationship between all federal agencies and tribes.

Tribes were quick to embrace the new concept. They anticipated a new era in which differences between the federal government and tribes would be resolved not unilaterally or through coercion and intimidation, but in give-and-take negotiations characterized by equality and mutual respect.

Despite tribes’ enthusiasm and high expectations for a dramatic change in their relationships with the federal government, this has not happened quickly or on any significant scale. There are two principal reasons for this. First, the executive branch is structured as a top-down hierarchic organization that is literally designed to execute or put into effect legislation created by Congress, the law-making branch of the United States government. Historically, executive agencies have not been encouraged to formally involve their constituencies—beneficiaries, clients, or recipients—in negotiations.²⁹

The second reason for the apparent reluctance by the federal agencies to operationalize President Clinton’s executive order as the tribes would like is the lack of substantial experience or understanding of the negotiation process itself. Agencies are deeply skeptical of negotiation because they believe that it translates into losing or abdicating some of their legislatively mandated authority. In their minds, negotiation is associated with compromise, or giving something up. Agency officials typically will take the position that they must make the final decision, that they are required by law to retain this authority.

In recent years, most agencies have begun, because of specific legislation, to engage in consultation with constituencies through mandated public hearings, citizen participation, and community involvement requirements and processes. Comments from the public are invited that are duly recorded to inform the decision makers in the agency at a later date. This, however, is distinct from negotiation between an agency and its publics to formulate mutually satisfying win/win agreements. Nonetheless, most federal agencies still chose to regard consultation as a way of fulfilling the government-to-government relationship.

Given this context, it should not be hard to understand why the first round of talks between the Timbisha Shoshone tribe and the two principal federal agencies ended in an impasse. The parties went into this process with very different expectations. These federal agencies interpreted quite literally their instructions from Congress, incorporated in section 705(b) of the California Desert Protection Act, to conduct a study of lands inside and outside the national park that might be suitable for a reservation. They had prior experience preparing studies and they initiated the process they were accustomed to use to gather and analyze data and prepare a final report. Since the legislation also explicitly stated that they conduct the study in consultation with the tribe, they accommodated this according to past experience.

In marked contrast, the tribe had very different expectations. It was convinced that the federal agencies, under President Clinton's new executive order, were bound to initiate a government-to-government negotiation. It reinforced this expectation with what it believed Congress had intended.

Nothing in federal law or congressional instructions to the Department of Interior in the California Desert Protection Act required the federal agencies to approach the Timbisha Shoshone tribe as an equal and be committed to negotiate a win/win agreement. President Clinton's executive order holds out hope to tribes that this could be a standard that agencies might aspire to, but it still is just advisory. Moreover, how to achieve a government-to-government relationship is still not clear. There appears to be sufficient room to accommodate those who would argue that consultation is an appropriate strategy to fulfill the executive order.

In the final analysis, it was the Timbisha Shoshone tribe that shaped the government-to-government relationship. In a sense, this makes it all the more remarkable. After the disappointing first round of talks, the tribe had to assert its sovereignty and persuade the agencies that indeed it was in their interest to come to the table and engage in bilateral negotiations on a government-to-government basis. The tribe had to demonstrate that it had the power to threaten the Department of Interior's interest in maintaining its reputation and national image as being fair to American Indians. It had to demonstrate that it could threaten the agencies' positive relationship with and widespread support from members of Congress, environmental groups, other Indian tribes, national Indian organizations, user groups (park visitors), and the national media. These groups reached a point at which they began to question NPS and BLM policies vis-a-vis the Timbisha Shoshone and Indian people in general.

During the several years of public controversy, the tribe was effective in modifying the federal government's earlier expectations. The department discovered that politically it could not submit a study report to Congress without the tribe's cooperation. Moreover, it discovered that total exclusion of the tribe from the park was no longer a viable option. During this period, the federal agencies were effective in modifying the tribe's initial expectations. The tribe scaled down its earlier proposals for hundreds of thousands of acres of trust land.

The federal government was finally able to switch gears when new people at a higher level took note and became involved. By forming a new federal team with new people at a higher level of decision-making, the federal government was able to take a fresh approach without being too closely identified with the ill-fated strategies of the past. Since both parties had lower expectations, they approached the second round of talks ready to exchange information, generate a range of possible solutions, and talk with one another until they identified a way that satisfied the interests of each side.

What impact might the Timbisha Shoshone experience have on future government/tribal relationships? At the very most, this case created new opportunities for both tribes and government agencies to go beyond what is familiar to them, to move beyond the consultation process, which essentially

fails to acknowledge the separate sovereign status of tribal governments. What the Timbisha case proves beyond a reasonable doubt is that the federal government can successfully enter negotiations committed to mutual gain, interest-based negotiations without abdicating its congressionally mandated authority or giving up its sovereignty. Within the context of win/win negotiations, both parties can promote and protect their vital interests while also ensuring that the same opportunity is accorded to the other side. In the process, neither side has to give up anything that is vitally important to it.

In the final analysis, the negotiated agreement between the Department of Interior and the Timbisha Shoshone satisfies the mutual interests of the parties and is perceived by both as a win/win situation. This is not an agreement defined by people in Washington, D.C., either in Congress or in the upper reaches of the Department of Interior, remote from the field of action. Instead, it was hammered out in Death Valley through a process of give and take by representatives of policy makers as well as by people who will have to live with the agreement as they implement it from day to day. Local folks who had a hand in formulating the agreement have a sense of ownership and thus are more likely to abide by it.

The agreement is a far cry from what was first believed possible by the parties involved and by many interested onlookers. It is a fine tribute to every person around the negotiating table who had the courage to explore unfamiliar ground and the faith in the negotiation process. What transpired is truly a prototype government-to-government negotiation. To the extent that more people involved in Indian affairs in this nation follow this example, the cumulative effect could well transform the relationship between the federal government and American Indian tribes forever.

NOTES

1. Pauline Esteves, personal conversation with author, 1994. For additional background on the troubled relationship between the Timbisha Shoshone and the National Park Service, see Steve Crum, "A Tripartite State of Affairs: The Timbisha Shoshone Tribe, the National Park Service, and the Bureau of Indian Affairs, 1933-1994," *American Indian and Culture Research Journal* 22:1 (1998): 117-136.

2. California Desert Protection Act, PL 103-433.

3. The tribal negotiation team prepared and submitted a formal process proposal to the NPS superintendent in Death Valley. Though the superintendent had not anticipated anything so formal, he accepted the tribe's process proposal with several suggestions. He recommended that there be an impartial facilitator. He also suggested that the tribe refrain from having communications with anyone above him in the agency's organizational hierarchy or in Congress. The tribe agreed to a facilitator but did not accept the restriction on its ability to communicate with others inside and outside NPS (Richard F. Boland, tribal administrator, letter to Superintendent Richard H. Martin, 15 May 1995 [copy on file with author]).

4. The proceedings of the first meeting and the agreed upon scope of the study process were recorded in the official minutes dated 6 June 1995 (copy on file with author).

5. Richard Boland, tribal administrator, and Fred Marr, CILS attorney, conversations with author after May 1995 meeting.

6. These observations expressed by the tribal team members were confirmed by two staff members who represented the Pacific Regional Office of the Bureau of Indian Affairs at the May 1995 meeting (conversations with author, 15 November 1999).

7. In conversations with the author around this time, Fred Marr and Richard Boland, negotiators for the tribe, indicated that they were given assurances that this high-level group would consist of Elizabeth Homer, director of the Office of American Indian Trust, Catherine Vandemoer, special assistant to the assistant secretary of Indian Affairs, and Patricia Parker, chief of the American Indian Liaison Office at NPS.

8. Based on conversations with members of the tribal negotiation team directly after the meeting in the firehouse.

9. Frederick I. Marr, representing the Timbisha Shoshone tribe, and the counsel to the Timbisha Shoshone, letter to Secretary Babbitt, 31 October 1996 (copy on file with author). Quoting from the letter: "The Tribe rejects the present NPS and BLM 'study in its entirety, as a sham. The 'study' was not done in 'consultation with the Timbisha Shoshone Tribe' or in 'consultation with relevant federal agencies.' As pointed out above, it is not a 'study.' Furthermore, the document omits any analysis of the vast Tribal ancestral homelands inside the Park in relation to the suitability of setting aside all or portions of these lands in trust for the Tribe.... It is a document created by NPS and BLM. It is in violation of the Desert Protection Act. It is an illegal document. We caution NPS and BLM not to complete their 'study' on the Timbisha or submit it to the Secretary, and again refer you to the Tribe's letter sent to the President dated September 8, 1996."

10. This sentiment was stated and reiterated numerous times by the tribe in its letters to Secretary Babbitt, dated 31 October 1996, and to President Clinton, dated 8 September 1996. Copies of both letters on file with author.

11. This information was obtained in interviews by the author with Fred Marr, tribal attorney, in October 1996. Copies of some letters sent to the White House are on file with author.

12. This assessment is based on discussions with staff members of this Senate Committee held in September 1997.

13. These thoughts were expressed by John Reynolds in the author's presence at an American Bar Association Convention in San Francisco on 7 April 2000.

14. These feelings were expressed in confidence to the author on several occasions during the second round of talks.

15. Steven Haberfeld, representing the tribe, letter to Patricia I. Parker, chief of the American Indian Liaison Office, 18 November 1997 (on file with author).

16. Patricia I. Parker, chief of the American Indian Liaison Office, letter to Steven Haberfeld, executive director of the Indian Dispute Resolution Service, Inc., 22 December 1997 (copy on file with author).

17. Haberfeld to Parker 18 November 1997.

18. Ibid.

19. Ibid.

20. Parker to Haberfeld, 22 December 1997.

21. Haberfeld to Parker 18 November 1997.

22. California Desert Protection Act, PL 103-403.
23. Discussions between the author and Barbara Durham, tribal administrator, and Dorothy Alther, tribal attorney, following the round-two meeting.
24. Conversations between Patricia Zell and Mike Jackson, staff to the Senate Committee on Indian Affairs, and members of the tribe's negotiating team.
25. Preamble and Framework for achieving a Timbisha Shoshone homeland. Timbisha Shoshone tribe/US Government Land-Base Negotiation Meeting, Death Valley, 15-16 January 1998. Copy on file with author.
26. This is based on conversations with Richard Boland, tribal administrator, and Fred Marr, tribal attorney, at tribal planning meetings in Las Vegas in September 1997.
27. Comments made by John Reynolds to the author after the negotiations were completed on 7 April 2000.
28. These were pared down from the 11,000 acres that were discussed during the first round of talks because BLM discovered that there were certain encumbrances, such as mining claims and lack of access, which had to be avoided.
29. This change is a recent innovation in federal rule-making (negotiated rule-making). Agencies now negotiate the content of new regulations with their constituencies prior to publishing them in the federal register for public comment.